

Filed 12/17/98 @ 9:20 A.M.
J. Peter Bragg

ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION

In Re Applications of:)	MM DOCKET No.: 98-66
)	
HICKS BROADCASTING OF INDIANA, LLC)	
)	
Order to Show Cause Why the)	
License for FM Radio Station)	
WRBR (FM), South Bend, Indiana,)	
Should Not Be Revoked;)	
)	
AND)	
)	
PATHFINDER COMMUNICATIONS CORP.)	
)	
Order to Show Cause Why the)	
License for FM Radio Station)	
WBYT (FM), Elkhart, Indiana)	
Should Not Be Revoked;)	

Volume: 5

Pages: 449 through 664

Place: Washington, D.C.

Date: October 22, 1998

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Should Not Be Revoked;)	

Courtroom 1, Room 227
FCC Building
2000 L Street, N.W.
Washington, D.C.

Thursday,
October 22, 1998

The parties met, pursuant to the notice of the
Judge, at 9:00 a.m.

BEFORE: HON. JOSEPH CHACHKIN
Administrative Law Judge

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I N D E X

<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>	<u>VOIR DIRE</u>
Robert A. Watson	477				

E X H I B I T S

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Hearing Began: 9:00 a.m.

Hearing Ended: 4:00 p.m.

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1 P R O C E E D I N G S

2 THE COURT: What are we doing this morning first
3 thing?

4 MR. BERNTHAL: Your Honor, I think there are a
5 couple of preliminary matters this morning, first with
6 respect to the issue of getting these exhibits straightened
7 out. We have, at least for Pathfinder, I guess we have
8 completely renumbered all the exhibits and we have furnished
9 renumbered copies to the reporter and to the parties. So, I
10 think we've covered from our side that obligation already.

11 THE COURT: Will I get a copy?

12 MR. BERNTHAL: That's coming up now. We weren't
13 going to leave you out, Your Honor.

14 MR. HALL: And Your Honor, on behalf of Hicks we
15 are pleased to report that after eliminating the things that
16 were redundant with the Bureau and Pathfinder, we only have
17 six exhibits. So, if we could retrieve from you the binder
18 we previously provided, we will replace it with a much
19 smaller one, which I'm sure we'll all be happy about.

20 MR. BERNTHAL: It should be clear that the wisdom
21 of your ruling yesterday is now becoming apparent.

22 If Your Honor please, there are a couple of other
23 preliminary matters. First, with respect to our case, we've
24 spoken with the Bureau and we -- neither of us expects that
25 there's much likelihood that we would start today. And so,

1 we have not called our first witness to be available today.
2 We're expecting to do that tomorrow. If we all get
3 surprised and finish today, we would not be ready to start
4 till tomorrow morning, and they're amenable to that because
5 we don't think that's going to happen, if that's all right
6 with you.

7 THE COURT: Alright, if it's all right with the
8 parties.

9 MR. BERNTHAL: With respect to the evidentiary
10 matter that came up at the end of the day yesterday, a joint
11 motion has been prepared by Hicks and Pathfinder which we
12 will submit to you now. As we had agreed yesterday, we have
13 already provided a copy to the Bureau. I assume that the
14 Bureau may want to respond to it, but we assumed also, that
15 this would not be something you'd want to rule on now, but
16 we would like to submit it to you so that you would have an
17 opportunity, consider it and let the Bureau have adequate
18 time to respond.

19 THE COURT: Alright.

20 MR. HALL: Here's your copy, Your Honor. Copies
21 were faxed to counsel for all the parties including Mr.
22 Crispin, who's not here this morning. I have additional
23 copies if anyone's fax wasn't legible or they would like an
24 additional copy.

25 MR. BERNTHAL: Your Honor, from Pathfinder there

1 is just one other preliminary matter. Literally, at the
2 very end of Mr. Kline's testimony yesterday, there was a
3 question which you asked him and an answer given, which
4 after the close of the session we thought ought to be at
5 least addressed this morning.

6 THE COURT: Is there anything in here which deals
7 with the Federal Rules of Evidence, or the position is that
8 the Federal Rules of Evidence don't apply or exactly what?

9 MR. HALL: Your Honor, the argument is that you
10 don't get the Federal Rules of Evidence because 12321(d) is
11 the exclusive means, exclusive way by which you can get
12 materials in. There's an additional argument that even if
13 the Federal Rules did apply, they wouldn't allow them to be
14 admitted wholesale. You have to parse through them. When
15 we talked --

16 THE COURT: Well, I agree it has to be parsed out,
17 but I thought I was expecting something about the Federal
18 Rules of Evidence that I wrongly interpreted 801. And
19 looking through the 17 pages here, I don't find anything
20 here that my interpretation of 801 is wrong. Simply, the
21 argument is that the Commission is not supposed to use the
22 Federal Rules of Evidence and they're bound by somehow the
23 procedural rules.

24 MR. HALL: Well, it's not so much they're not
25 supposed to, but in this instance they have chosen -- the

1 rule 1.351 which governs the use of Federal Rules of
2 Evidence as accept as otherwise provided, we believe that
3 Rule 1.321(g) does specifically, otherwise provide.

4 THE COURT: Do you have any Commission cases to
5 support that?

6 MR. HALL: There's been no case we've ever found,
7 Your Honor, that --

8 THE COURT: With good reason because I don't think
9 the Commission has ever held that its rules preclude rulings
10 under the Federal Rules of Evidence when you're dealing with
11 admissions.

12 MR. HALL: Well, what I was going to say is we
13 haven't found any case in which someone has ever tried to
14 introduce a civil -- a previous civil litigation deposition
15 into --

16 THE COURT: Oh, I know I've had a previous case in
17 which I allowed it. And as far as I know, the Commission
18 has never disagreed with my position that under Rule 801
19 admissions are that you can use 801 in a Commission
20 proceeding.

21 We did find the statement, "Find something where
22 the Commissioner has said that Federal Rules of Evidence are
23 precluded." That somehow the Commission rules on discovery,
24 and that's what you're talking about --

25 MR. HALL: That's correct.

1 THE COURT: -- that preclude the use of the
2 Federal Rules of Evidence in determining whether to allow
3 admissions. I think that would be germane to what we're
4 dealing with here. If you find that, I'd like to see that
5 because I'm not aware of it.

6 MR. HALL: Well, that's not in there, Your Honor.
7 The argument is that 1.321(d) provides an explicit and
8 specific, and we believe exclusive way. Either it is not a
9 corresponding entry in 1.321(d) as there is in the Federal
10 Rules of Civil Procedure that says you can also look to the
11 Federal Rules of Evidence. That's not in there.

12 We believe the Commission is intentionally taking
13 a more limited approach to permitting the use of
14 depositions. And it's important that we cite the Commission
15 ruling at the time they introduced 1.321(d).

16 THE COURT: That deals with discovery.

17 MR. HALL: It deals with the use of depositions.

18 THE COURT: At discovery.

19 MR. HALL: But it also says depositions from prior
20 matters.

21 THE COURT: What does that have to do with --

22 MR. GARDNER: Your Honor, it's not -- just to
23 answer your question. The rule doesn't deal with the use of
24 depositions in discovery. It's the introduction of
25 depositions in a proceeding such as this in a hearing.

1 THE COURT: I understand that. The use of
2 depositions -- there are certain rules similar to the
3 Federal Rules of Civil Procedure, I would note, dealing with
4 admissions of depositions. But what does that have to do
5 with the Federal Rules of Evidence dealing with admissions?
6 What can be introduced as an admission?

7 MR. GARDNER: Your Honor --

8 THE COURT: Certainly, it can be introduced under
9 impeachment under 607 of the Federal Rules, but are you
10 saying that's precluded also for impeachment purposes
11 because it's not covered in the Commission's rules?

12 MR. BERNTHAL: Your Honor, I think it's just the
13 opposite is what we're saying, is that the use of prior
14 deposition testimony is traditionally and customarily used
15 in FCC hearings for impeachment purposes. That's precisely
16 what it is used for.

17 The problem here is that --

18 THE COURT: Well, if you want to follow the rules,
19 I mean I guess there's nothing in the rules say that you can
20 use impeachment to impeach your own witness, although the
21 Federal Rules permit it now. I mean, you could argue it's
22 not in the Commission's rules, therefore, you can't use it
23 for that purpose, but I don't think it excludes the use of
24 --

25 MR. HALL: I believe it is in the Federal Rules,

1 Your Honor.

2 MR. BERNTHAL: I think we would ask Your Honor
3 just to reflect if you would on what we've submitted,
4 because I think that the rule is explicit on this point. It
5 says how you're supposed to use depositions in a hearing,
6 and when they're admitted and when they're not.

7 And I think the argument we tried to make to you
8 is not merely a technical one. But we think that there is a
9 -- I was about to say that there's a fundamental unfairness
10 to us, but I also don't want to be unfair to Mr. Shook. We
11 did not expect to argue this before you this morning because
12 he's not even really had a chance to -- although you're
13 doing pretty well without him.

14 THE COURT: I understand what you're saying about
15 the rules, but you're merely reading the literal reading of
16 the rules. I would like you to show me Commission precedent
17 that supports your position. And I can't believe that there
18 isn't -- must be some Commission precedent which doesn't
19 deal with the Federal Rules of Evidence, when it's
20 appropriate, when it can be used and saying anything that
21 rules dealing with discovery somehow preclude the
22 consideration of the Federal Rules of Evidence. That's, I
23 mean, just literally reading the rule. It doesn't seem to
24 give me much help.

25 If there is Commission precedent in support of

1 your position, I'd like to see it.

2 MR. HALL: We do not have Commission precedent
3 either way. There obviously is Commission precedent saying
4 that the Federal Rules of Evidence apply and 801(d)(2)(D) in
5 appropriate situations, but not involving the use of
6 previous depositions which is covered explicitly, we think,
7 by that rule.

8 We did find again a statement by the Commission in
9 enacting 1.32(d) where they were concerned about turning
10 their hearings into trials by depositions. It arose in a
11 difference context, but we think that that concern is
12 germane here.

13 THE COURT: But this was not a deposition taken in
14 this proceeding in which the rules deal with.

15 MR. HALL: That's correct.

16 THE COURT: This was a writing in another
17 proceeding. There's nothing in the rules -- the FCC Rules
18 which deal with depositions or affidavits, for instance,
19 taken under another context in another proceeding. They
20 deal strictly with the use of discovery, material that is
21 discovered in this proceeding and how it can be used in a
22 hearing later on.

23 Under what circumstances can that deposition be
24 used in this hearing? How is that possibly germane with
25 deposition which taken in another proceeding under a

1 completely different context, whether that material or any
2 other material can be admitted in this proceeding?

3 MR. HALL: Well, because Rule 1.321(d) doesn't
4 just apply to the use of depositions and discovery in this
5 matter, but also addresses in 1.321(d)(5) the use of prior
6 depositions.

7 THE COURT: What depositions are they talking
8 about?

9 MR. HALL: They're talking about from prior
10 Commission hearings between the same parties --

11 THE COURT: Prior Commission hearings?

12 MR. HALL: That's correct.

13 THE COURT: But this is not a prior -- we're
14 talking about a 1996 deposition that was taken in a civil
15 suit.

16 MR. HALL: That's correct but --

17 THE COURT: Not under the Commission's Rules. In
18 other words, if you take something under discovery in a
19 Commission proceeding, these rules are meant to deal with
20 how that could be used if at all in a Commission proceeding.
21 So, not only do I have the question of whether 801 is
22 applicable, we have a separate question here. How do these
23 rules relate to the situation we have at hand, namely, an
24 affidavit, or in this case, a deposition given in an
25 entirely different proceeding?

1 MR. HALL: Well, they relate just because they
2 exclude -- that while they include --

3 THE COURT: Where is there any -- well, there's
4 another thing you have to show me precedent for. Where a
5 deposition taken in an entirely different proceeding, the
6 civil proceeding, is somehow governed by the discovery rules
7 set out in the Commissions Rules.

8 My understanding of the discovery rules, they deal
9 with discovery in that proceeding or in another Commission
10 proceeding perhaps if you want to raise the question of res
11 judicata. But how does that have anything to do with
12 discovery or with a trial somewhere in another proceeding?

13 MR. BERNTHAL: Your Honor, I think first of all
14 1.321 does not govern discovery. It's title is, "Use of
15 Depositions at the Hearing." So --

16 THE COURT: Which depositions are we talking
17 about?

18 MR. HALL: Well, it does not -- the rule itself --
19 I'd like to address that. The rule itself does not indicate
20 that it refers to depositions in the same proceeding. In
21 fact, it talks about depositions on behalf of a party or not
22 behalf of a party in other proceedings. That's not the
23 issue here. I think here's the problem.

24 THE COURT: This is 1.321?

25 MR. HALL: Yes. I don't think anywhere in the

1 rule does it refer to depositions in the same proceeding. I
2 don't think it says that. It says -- it just talks about
3 how you use depositions generally in a hearing at the FCC.

4 And if you look at --

5 THE COURT: Where are you referring --

6 MR. BERNTHAL: 1.321(d), Your Honor, the title is,
7 "Use of Depositions at the Hearing."

8 THE COURT: What depositions are they referring
9 to?

10 MR. BERNTHAL: In my reading and maybe I'm missing
11 something, but in my reading is that it does anywhere in the
12 rule refer to depositions taken in that proceeding. It
13 talks about depositions.

14 THE COURT: That doesn't make sense. What if we
15 didn't have a deposition? What if he gave an affidavit in a
16 civil proceeding and they agree to give an affidavit and it
17 wasn't a deposition?

18 MR. BERNTHAL: Your Honor, I'd at least like to
19 explain why this is an issue in my mind and why it's
20 significant. I think the problem here is this. We are in a
21 license revocation proceeding in which the Bureau has the
22 burden of proof and the burden of proceeding. The issue
23 here is addressed to the character of these Defendants and
24 whether they had an intent to deceive the Commission.

25 When you have a prior sworn statement, and in this

1 case, prior sworn testimony, it's perfectly legitimate for
2 the Bureau to proceed by putting the witnesses on the stand,
3 asking them questions under oath and using prior sworn
4 statements to impeach that testimony to note that it
5 contradicts that testimony, that it's inconsistent with that
6 testimony. The witness has an opportunity to explain, and
7 the parties have an opportunity to react to the Bureau's
8 reading or interpretation of prior sworn testimony. This is
9 not a letter. This is testimony in a prior proceeding.

10 Now, if you take wholesale in this case, what the
11 Bureau has opted to do apparently, is rather than call these
12 witnesses whose licenses are at stake and who are parties
13 here, rather than call them, the Bureau has opted instead I
14 gather, merely wholesale to submit testimony that they gave
15 in another case in another context and say, "I've met my
16 burden now."

17 I think that's a problem. I think it's a problem
18 not only with respect to their burden of proceeding and
19 their burden of proof, but I think it's a much more
20 fundamental problem, one of fairness, because Your Honor, if
21 Mr. Dille is on the stand and is asked a question about the
22 operative facts that occurred here by Mr. Shook or by you,
23 we all have the opportunity to look at what he may have said
24 before in a prior deposition, and it may be used to impeach
25 what he said.

1 You get an opportunity to react to the credibility
2 and demeanor of his answer as he tries to wrestle with what
3 may be inconsistent testimony. We have the opportunity to
4 redirect questions to him to get him to explain what may
5 appear to be inconsistent but may, in fact, not be. That's
6 the essence of why we're here. We don't need to have a
7 hearing, Your Honor, if there's not going to be the critical
8 component, which if your evaluation of the credibility and
9 demeanor of the witnesses especially in the face of prior
10 inconsistent testimony. That's the most essential time when
11 you need to be seeing and hearing the witnesses.

12 Now, what do we have going on here instead? What
13 we have is that Mr. Shook has decided to meet his burden by
14 putting in these depositions as silent impeachment. The
15 idea would be that he puts in testimony given in a different
16 context in 1996, and when we get to the finding stage he may
17 say, "Well, look at this. He said this. Now, in this
18 hearing today because we will call him, he said this."

19 In his findings, he can say that they're
20 inconsistent, but he hasn't then confronted the witness with
21 that inconsistency. He hasn't used the prior deposition to
22 impeach the witness. He hasn't given us an opportunity to
23 respond to his interpretation of what he's reading from
24 1996, and he hasn't given you the opportunity to weigh the
25 credibility and demeanor of the witness when confronted with

1 this apparent inconsistency.

2 This is the essence of why we're here, Your Honor.
3 This case is not about -- this is not about time records and
4 the things that we've been talking about right now. It's
5 about the character of these people.

6 THE COURT: Look, your complaint is not with me.
7 You should have told the people who changed the Federal
8 Rules of Evidence. They didn't like the way things were
9 going. The Federal Rules of Evidence permits admission
10 under 801, and it doesn't mean that you can't put the
11 witness on to explain away those admissions. But there's no
12 limitation on the use of those admissions. Parties can use
13 it for purposes of impeachment or they can use it as
14 admissions, as if they testified to those facts.

15 In other words, Mr. Dille takes the stand and says
16 something completely opposite to what he said two years ago
17 in a deposition in a civil proceeding, then the Bureau could
18 argue what he said in the deposition proceeding, his
19 admissions then should be relied on and not his testimony.
20 They don't have to solely use it for impeachment. They can
21 use it for admissions if it comes in under 801. That's the
22 Rules of Evidence. You may not like it, but that's the
23 Federal Rules of Evidence.

24 MR. BERNTHAL: Well, of course, he was not -- I
25 mean we've had the argument with you already about who was a

1 party in that prior deposition.

2 THE COURT: I said the question is -- the only
3 question before me is whether or not that deposition
4 testimony comes within as an exception to the hearsay rule
5 under 801. Now, that's what I wanted you to tell. I wanted
6 you to give me a brief on.

7 Now, what you've given me here -- all the
8 discovery rules deal with is depositions taken before the
9 Commission. It has nothing to do with depositions taken six
10 years ago in another entirely different proceeding. That
11 question comes then whether or not those depositions --
12 those testimony given, whether it was an affidavit or in a
13 deposition or any other kind of form, whether it's
14 admissible as an admission under Rule 801.

15 That's what I wanted you to tell me. I thought
16 that's what the argument was about. I don't see how --
17 there's nothing in the Commission's rules which govern
18 testimony given in an entirely different proceeding. The
19 discovery in the Commission's rules here, the use of
20 depositions, deals strictly with depositions taken in a
21 Commission proceeding and when a party can use those
22 depositions in a Commission proceeding and when they can't.
23 That's what it deals with.

24 The Commission certainly wasn't attempting to deal
25 with testimony given in an entirely different proceeding.

1 There's nothing here indicating that. And it certainly
2 wouldn't be appropriate in the Commission's procedural rules
3 when there is a Rules of Evidence to make a determination --
4 I could use any writing, whether it said affidavit or a
5 deposition. If you can show me to the contrary, I'd like to
6 see it. Or if you can show me that the deposition testimony
7 doesn't come in as an exception to the hearsay rule under
8 801. I'd like to see it. That's what I'd like to see.

9 MR. BERNTHAL: We will certainly look further, and
10 if we can't show you, we obviously won't. And that seems to
11 be where you're focused and that would be your ruling.

12 I would ask however, Your Honor, that you would
13 consider the point that I've just made about the silent
14 impeachment of witnesses, which I think is fundamentally
15 improper.

16 THE COURT: It's not impeachment. It's the same
17 as when they submitted a Notice to Admit, and you answered
18 it. You admitted to certain facts. Now, they don't have to
19 put the witness on the stand.

20 MR. BERNTHAL: Agreed.

21 THE COURT: They just put the admissions in. Now,
22 what I'm saying if the admissions are made in the
23 deposition, it's also admissions. And they could use those
24 admissions if it's within 801 without putting anybody on the
25 stand.

1 MR. BERNTHAL: Sure. If we've made an admission
2 we hardly can be heard to complain about the admissions use
3 or agreement to it. I understand that. But these are not
4 depositions. These are not admissions by us. If Mr. Hicks
5 gave a deposition in a prior civil proceeding, that's not an
6 admission by Pathfinder in any way, shape or form. How can
7 it be used against us?

8 THE COURT: It can be used against Hicks. It's an
9 admission by Hicks.

10 MR. BERNTHAL: How can it be used against us? We
11 don't have an opportunity to examine.

12 THE COURT: I agree with you that an admission by
13 Hicks cannot be used against Pathfinder unless there's some
14 showing that Hicks was an agent to Pathfinder, but certainly
15 can be used against Hicks. And there is an issue here
16 dealing with Hicks' license as well as Pathfinder's license.

17 So, you're right. Hicks' deposition testimony,
18 unless there's some causal connection between Hicks and
19 Pathfinder, it can't be used against Pathfinder. It
20 certainly can be used against Hicks.

21 MR. BERNTHAL: Your Honor, I would submit to you
22 that we're really losing the forest for the trees on this
23 point, because this is an unusual situation. All the
24 operative facts have been addressed in a prior trial. And
25 that testimony is evidence of the operative facts. It's

1 evidence of what was said back then. The people who are
2 testifying -- the reason we're having a hearing now is so
3 that you can hear these witnesses talk about these folks,
4 and you can believe what you choose to believe and make
5 credibility assessments and demeanor assessments as you're
6 suppose to do. But we have --

7 THE COURT: Am I supposed to ignore the universe,
8 the fact that statements were made at an earlier time and
9 then now -- I mean, that was the basis of the hearing order,
10 I presume. Reading the hearing order was based on
11 statements made in the civil proceeding. That was, as far
12 as I know, that's what the hearing order talks about. Now,
13 it's up to you to come in and explain those things if there
14 is some contradiction. But to tell me that I should ignore
15 it because it happened in another context --

16 MR. BERNTHAL: I'm not asking you to ignore it at
17 all. I was saying something very different. I didn't
18 understand the hearing order to put the burden on the
19 parties.

20 THE COURT: That's right. It's not the burden on
21 you. The burden is on the parties, and they have a right to
22 proceed with what the Rules of Evidence omit. I mean,
23 that's -- and they call witnesses and the extent which they
24 have admissions of parties or agents of parties they could
25 use that. I mean, that's where the Rules of Evidence come

1 in. That's what we're governed by.

2 MR. BERNTHAL: Well, Your Honor, as my partner,
3 Mr. Johnson, said yesterday, I certainly could be wrong, but
4 this notion of silent impeachment, which is what this is, is
5 really, really I think a fundamental unfairness to the
6 parties here. And I would just ask that you think about
7 that.

8 If the Bureau believes that there was testimony
9 given on the same points two years ago, and they believe
10 that it's inconsistent with the testimony to be given here,
11 then I think they have -- they ought to raise it in the
12 hearing room and they ought to say what they think is
13 inconsistent.

14 THE COURT: Well, they did with Mr. Kline.

15 MR. BERNTHAL: No, Your Honor. What you're saying
16 now is that if those depositions come in, they're not
17 planning to even call Mr. Dille. They're not calling Mr.
18 Hicks. They're not calling the principles here. All
19 they're doing is submitting -- all they want to do is submit
20 depositions taken in a civil case two years ago.

21 THE COURT: If it's relevant to this proceeding,
22 it will be received under Rule 801, unless you can show me
23 801 doesn't apply. You can put Mr. Dille on and he could
24 testify. I mean, that's -- I assume you have all these
25 witnesses lined up for them to testify and explain if

1 there's any contradiction of what took place in the 1996
2 proceeding, what had been said. The game is played under
3 801.

4 MR. BERNTHAL: Well, you're pretty clear in your
5 position, Your Honor. I'm not going to -- and I appreciate
6 the time you've given me to respond.

7 THE COURT: Unless you can show me to the
8 contrary.

9 MR. BERNTHAL: We'll look and see what we can
10 find.

11 THE COURT: Alright.

12 MR. BERNTHAL: But we do want to state our
13 position for the record that we think that this notion sets
14 up a construct for really fundamental unfairness, because we
15 can find ourselves in a position where no concern about
16 prior inconsistent testimony for impeachment purposes is
17 raised in this hearing room. There's no discussion about
18 it. It doesn't happen in front of you. The witness doesn't
19 get a chance to respond to it, but in findings later -- in
20 findings later, it is alleged that the testimony can't be
21 believed because this statement is impeaching that
22 statement.

23 And the statement of 1996 is impeaching a
24 statement of 1998. At least, I always thought that had to
25 be done in front of you, Your Honor, so that you could

1 assess it. The witness could react to it, and the parties
2 could respond to it. And by this ruling, you are going to,
3 in a sense, both either truncate or eliminate that process.

4 Now, the Bureau, of course, can still impeach
5 these witnesses with that hearing testimony, and they may
6 choose to do so when they're on the stand. I can't
7 anticipate that.

8 But I do know that if you allow the wholesale
9 admission before these witnesses even testify of 1996
10 hearing testimony, which is where we were going yesterday,
11 and allow them to meet their burden just by putting that in,
12 then I believe you've set up a construct that allows for the
13 silent impeachment of these witnesses so that we'll be
14 arguing in writing later about which version was accurate
15 and who was telling the truth. And you have no ability, at
16 that point, to evaluate the witness' reaction to reconcile
17 the testimony.

18 THE COURT: Of course I would. When the Bureau
19 has gone forward with its burden of proceeding, then you
20 will have the opportunity to call Mr. Dille and Mr. Hicks,
21 and they will testify. And then I will have to weigh as to
22 what I believe is more credible, the testimony they gave in
23 1996 or the testimony they're giving on the stand. And I'll
24 have a full opportunity to view the witness. That's the way
25 -- that's what's going to happen.

1 Maybe there isn't contradictions. I don't know.
2 There certainly is an inconsistency between what Mr. Kline
3 said concerning when he met Mr. Hicks with what he said in
4 the 1996 deposition. And of course, you gave his
5 explanation and that I waive. And that's what the trier of
6 fact does. He waives --

7 MR. BERNTHAL: Exactly, Your Honor. That's
8 exactly what we want to see happen in the remainder of the
9 hearing.

10 Now, let's assume that when we get to findings
11 stage, let's assume that Mr. Kline's 1996 deposition has
12 been admitted wholesale. And let's assume that what the
13 Bureau decides to do is to address not that issue, but a
14 completely different issue that no one talked about in this
15 hearing. That is that he said something else in 1996 that
16 he thinks is inconsistent, but he never asked Mr. Kline
17 whether it was inconsistent.

18 THE COURT: He doesn't have the obligation to ask
19 Mr. Kline. It's your obligation. That's why I made the
20 point yesterday that I wanted the Bureau to tell me -- to
21 offer into evidence the parts of the deposition which they
22 felt were relevant, so then you would have the opportunity
23 then to ask Mr. Kline if he had any explanation for that
24 material. And presumably, as we parsed through the
25 depositions, and when I make my determination of what's

1 relevant or not relevant, you will have an opportunity with
2 all your other principles.

3 MR. BERNTHAL: Your Honor, I understand the sense
4 of that. I'd just point out that what you've set up though
5 is for the Bureau to have said, which they did, that in a
6 24-page deposition of Mr. Kline, they proposed pages 3, 4 --
7 I withdraw that comment. That's reasonable.

8 I mean, our concern is that there's just wholesale
9 inclusions of big chunks of testimony, but I don't think
10 that that's such a good example.

11 MR. HALL: That is the entire deposition of Mr.
12 Kline with the exception of a few instructions, I believe.

13 MR. BERNTHAL: Well, maybe I've misunderstood.
14 Maybe it is the whole deposition. That was the point I was
15 going to make.

16 THE COURT: We'll go through deposition, and if
17 you make your objections on grounds relevance what have you,
18 fine, I'll make my ruling. But we're going to proceed in
19 accordance with the Federal Rules of Evidence. I have no
20 other choice but to proceed in that manner.

21 MR. BERNTHAL: The point I was just going to make,
22 Your Honor, and then I'd like to stop because I think that
23 I'm abusing the privilege you're giving me to argue this.

24 In Mr. Kline's case, it really is essentially the
25 entire deposition that the Bureau's putting in.

1 THE COURT: Well, wait and see what the Bureau
2 wants to offer, and I'll make my rulings.

3 MR. BERNTHAL: Okay.

4 THE COURT: Alright.

5 MR. BERNTHAL: Thank you.

6 THE COURT: Okay. Where do we go from here?

7 MR. SHOOK: Well, perhaps for the orderly
8 disposition of matters to leave both Pathfinder and Hicks --
9 should probably have marked for identification their two
10 sets of documents because I suspect at some point during
11 today or tomorrow that various of them will be, you know,
12 draw forth. And I believe with what you had said yesterday
13 about how exhibits were set up, that it's much better for
14 them to go ahead and identify their exhibits now.

15 THE COURT: Well, we're still engaged in cross-
16 examination. It's still your witness. There's no point at
17 this time for them to mark their exhibits. Let's finish
18 with your direct case.

19 MR. BERNTHAL: Your Honor, I apologize, but I had
20 one other preliminary matter that I just didn't get to
21 complete because we went on longer than I thought we would
22 on the other one.

23 And this has to do with the question that was
24 asked. When Mr. Kline was testifying, at the very end of
25 his testimony yesterday, you asked him a series of questions

1 relating to his 1996 deposition. And you'll recall, Your
2 Honor, that literally, the very last question that you asked
3 before we ended yesterday, and I'm paraphrasing but I
4 believe it was something like this. "And did you consult
5 with lawyers prior to your testimony?" And he answered,
6 "No."

7 The session ended and we broke up and Mr. Kline
8 left, but when we went back -- when we were riding back in
9 the cab, it occurred to us that we wanted to make sure that
10 you and he were both talking about, "Did he consult with
11 lawyers before he gave his testimony in 1996?" That seemed
12 to be the context of the question, but our concern was that,
13 in fact, you might have been asking about his testimony
14 here. And we wanted --

15 THE COURT: That's exactly what I was asking.

16 MR. BERNTHAL: Then we want you to be aware --
17 he's gone. But we want you to be aware that he did indeed
18 speak with us prior to his testimony. And I think he just
19 misunderstood your question, but yes indeed, he did. I was
20 afraid that that was the case that you meant before this
21 hearing and we broke up --

22 THE COURT: I was concerned -- well, first of all,
23 I was concerned what records he might have examined prior to
24 this hearing, his testifying yesterday. And secondly,
25 whether he discussed his deposition testimony with counsel

1 before he testified yesterday.

2 MR. BERNTHAL: And I think, Your Honor, and it's
3 unfortunate he's gone, but I think he misunderstood your
4 question because his answer was no, and we want -- as
5 officers of this Court, we want to be clear that, in fact,
6 we did talk to him about it before his testimony. I think
7 there's just a misunderstanding on that point. But we want
8 the record to be accurate that he did speak with us in
9 preparation for his testimony yesterday.

10 THE COURT: Alright. Go ahead.

11 MR. SHOOK: The Bureau calls Robert Watson to the
12 stand.

13 THE COURT: So, I assume once we finish with Mr.
14 Watson, then we're going to proceed to the evidence you
15 intend to introduce?

16 MR. SHOOK: Yes, sir.

17 THE COURT: Then, you're going to close your case?

18 MR. SHOOK: Yes, sir.

19 THE COURT: Alright.

20 Whereupon,

21 ROBERT A. WATSON

22 having been first duly sworn, was called as a witness herein
23 and was examined and testified as follows:

24 DIRECT EXAMINATION

25 BY MR. SHOOK:

1 Q Could you state your full name, please?

2 A Robert A. Watson.

3 Q Mr. Watson, I know we've spoken before. In the
4 event that you can't hear me or you don't understand my
5 question, just indicate and I'll try to make myself clear to
6 you.

7 Could you state your present address, please?

8 A 25945 New Road, North Liberty, Indiana 46554.

9 Q What is the name of your employer?

10 A Pathfinder Communications Corporation.

11 Q Do you have any other employment situations or
12 relationships?

13 A Well, there's -- I'm also employed by Truth
14 Publishing Company, Inc., which is another company that's --

15 Q Just so we understand each other, is your
16 employment relationship strictly speaking with Pathfinder?
17 Is it with Truth, or is it with both of them?

18 A Is my employment situation with both of them?

19 Q Yes, sir.

20 A It's with both of them.

21 Q Now, are you an officer or director of either or
22 both of those companies?

23 A Yes, I am.

24 Q And what office do you hold?

25 A I'm the Secretary and Treasurer of both companies.

1 Q Are you a Director of one or both?

2 A I'm a Director of both.

3 Q Now, how long have you been an officer of
4 Pathfinder?

5 A I'm not positive but I would think I've been --
6 not at this present position, but an officer for 17 years.

7 Q Well, going over the past, let's say seven years.
8 Let's take it back to 1992, six years, what offices have you
9 held during that period?

10 A Since then I've been Secretary and Treasurer of
11 those companies.

12 Q And so, you have been Secretary/Treasurer for the
13 past six years?

14 A Correct.

15 Q Now, is there any one in particular at Pathfinder
16 that you report to?

17 A Yes. I report to John Dille.

18 Q Is that also the same with respect to Truth?

19 A Yes.

20 Q Is there anyone else that you report to?

21 A No. Well --

22 Q In other words, you view Mr. Dille as your
23 superior in the organizations?

24 A Yes.

25 Q And is there anybody else that you view as your

1 superior?

2 A No.

3 Q Now, I want to focus your attention on the period,
4 the end of March 1994, beginning of April 1994. To help you
5 put this in context, this is when Hicks Broadcasting of
6 Indiana, LLC, became the licensee of Station WRBR in South
7 Bend, Indiana. Are you with me?

8 A Yes.

9 Q As of April 1, 1994, did you have authority to
10 advance credit on behalf of Pathfinder to entities with
11 which Pathfinder did business?

12 A Would you repeat the question, please?

13 Q Okay. Did you have authority to advance some
14 credit on behalf of Pathfinder to entities with which
15 Pathfinder did business?

16 A I don't know if I had the authority.

17 Q Now, in addition to being -- well, as
18 Secretary/Treasurer, would I be correct that you were in
19 essence the Chief Financial Officer of Pathfinder and Truth?

20 A Yes.

21 Q You are now and you have been continuously for the
22 last six years?

23 A Yes.

24 Q As Chief Financial Officer, did you have authority
25 to advance credit on behalf of Pathfinder to entities with

1 which Pathfinder did business?

2 MR. GUZMAN: Objection, Your Honor. I think the
3 question is ambiguous. What does it mean to advance credit?
4 What context?

5 THE COURT: Would you rephrase the question?

6 BY MR. SHOOK:

7 Q I think I'll get back to this in a different way.
8 I want to direct your attention to the Joint Sales
9 Agreement, and I'm going to be introducing a number of
10 binders to you. I'm placing in front of you a number of
11 binders. In this case, it's Binder No. 1. It's not in
12 front of you at the moment. My colleague has it.

13 Okay. What I would like you to look at, Mr.
14 Watson, appears in Mass Media Exhibit 1. And it begins on
15 page 14. The pages are numbered on the bottom.

16 I'll be asking you a series of questions about a
17 document that's entitled, "Joint Sales Agreement." And the
18 copy that we have and that you should have as well, bears
19 the numbered pages at the bottom in handwriting from 14
20 through 30. I want you to just check yours to make sure
21 that you've got the same thing that I have.

22 A Yes, I do.

23 Q Now, I take it that you're generally familiar with
24 this document?

25 A Yes.